80-476

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

PETER T. DeMARCO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,

Respondent.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED

The Pennsylvania Medical Licensure statute governing license revocation, 63 Purd. Stat. § 421.15(a), sets forth a number of grounds which may form the basis for the Pennsylvania Board of Medical Education and Licensure to revoke a license to practice medicine. All of these grounds, with one exception, relate to the actual personal or criminal behavior of the doctor. The sole exception is the ground that another state has revoked the same doctor's license. The Board below and the Commonwealth Court relied on this one ground alone. Therefore the question presented is:

> Does not the Pennsylvania Board of Licensure deny due process to a licensed doctor when it revokes his license under 63 Purd. Stat. § 421.15(a) in exclusive reliance on an irrebutable presumption that revocation of his license in another state is a surrogate for proof of any actual personal unfitness to practice medicine?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
OPINION BELOW	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	7
APPENDIX:	
Adjudication and Order of the State Board of Medical Education and Licensure	A1
Opinion of the Commonwealth Court of Pennsylvania	A12
Order of the Commonwealth Court of Pennsylvania	A19
Order of the Supreme Court of Pennsylvania Denying Petition for Allowance of Appeal	A20
Order of the Supreme Court of Pennsylvania Denying Application for Reconsideration	A21
Affidavits	A22

TABLE OF CITATIONS

Cases:	Page
Bell v. Burson, 402 U. S. 535	7, 11
Berger v. Board of Psychological Examiners, 521 F. 2d 1056 (D. C. Cir. 1975)	11
Cleveland v. Lafleur, 414 U. S. 642	11
Stanley v. Illinois, 405 U. S. 645	7, 11
Tot v. United States, 310 U. S. 463	9, 10, 11
United States Department of Agriculture v. Murry, 413 U. S. 508	11
Vlandis v. Kline, 412 U. S. 441	11
Statutes:	
63 Purd. Stat. § 421.15(a)	i, 2, 5, 8
28 U. S. C. § 1254(1)	1
United States Constitution:	
Fourteenth Amendment	2

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner Peter T. DeMarco (Dr. DeMarco) respectfully prays that a Writ of Certiorari issue to review the judgment order of the Commonwealth Court of Pennsylvania entered in this matter December 4, 1979.

OPINIONS BELOW

The May 24, 1978, Adjudication and Order of the Pennsylvania State Board of Medical Education and Licensure revoking the license to practice medicine of Dr. DeMarco is not officially reported and appears in the Appendix at A1. The December 4, 1979, Opinion and Judgment Order of the Commonwealth Court of Pennsylvania affirming the action of the Pennsylvania State Board of Medical Education and Licensure is reported at 408 Atl. Rptr. 2d, page 572 and appears in the Appendix at A12. The May 5, 1980, Order of the Supreme Court of Pennsylvania denying petition for allowance of appeal of the above Judgment is not reported and appears in the Appendix at A20. The June 27, 1980, Order of the Supreme Court of Pennsylvania denying application for reconsideration of its denial of the petition for allowance of appeal is not reported and appears in the Appendix at A21.

JURISDICTION

The Judgment Order of the Commonwealth Court of Pennsylvania was entered on December 4, 1979. Dr. DeMarco's timely petition for allowance of appeal to the Supreme Court of Pennsylvania was denied on May 5, 1980, and a timely application for reconsideration of this denial was denied on June 27, 1980. This petition was filed within ninety days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Commonwealth Court by Writ of Certiorari is 28 U. S. C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Section 421.15(a) of the Pennsylvania Purdon's Statutes Annotated provides:

> "(a) The board shall have authority to refuse, revoke or suspend the license of a physician for any or all of the following reasons:
>
> (1) Failing to demonstrate the qualifications or standards for a license contained in this act or regulations of the board.
>
> (2) Making misleading, deceptive, untrue or fraudulent representations in the practice of medicine; practicing fraud or deceit in obtaining a license to practice medicine and surgery; or making a false or deceptive biennial registration with the board.
>
> (3) Being convicted of a felony in the courts of this Commonwealth or any other state, territory or country. Conviction as used in this paragraph shall include a finding or verdict of guilt, as admission of guilt or a plea of nolo contendere.
>
> (4) Having his license to practice medicine and surgery revoked or suspended or having other disciplinary action taken, or his application for a license refused, revoked or suspended by the proper licensing authority of another state, territory or country.
>
> (5) Being unable to practice medicine with reasonable skill and safety to patients by reason of ill-

ness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material, or as a result of any mental or physical condition.

In enforcing this clause (5), the board shall, upon probable cause, have authority to compel a physician to submit to a mental or physical examination by physicians designated by it. Failure of a physician to submit to such examination when directed shall constitute an admission of the allegations against him unless failure is due to circumstances beyond his control, consequent upon which a default and final order may be entered without taking of testimony or presentation of evidence. A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume a competent practice of medicine with reasonable skill and safety to patients.

(6) Violating a lawful regulation promulgated by the board or violating a lawful order of the board, previously entered by the board in a disciplinary proceeding.

(7) Knowingly maintaining a professional connection or association with any person who is in violation of this act or regulations of the board or knowingly aiding, assisting, procuring or advising any unlicensed person to practice medicine contrary to this act, or regulations of the board.

(8) Being guilty of immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, in which proceeding actual injury to a patient need not be established."

STATEMENT OF THE CASE

The present case has dimensions far beyond those which would arise from the case of an incompetent or fraudulent medical practitioner. Dr. DeMarco has not been charged with such poor medical practices. Rather he is the developer and, until the order below, the administrator of a drug—Procaine-PVP—which he and his patients believe confers significant healing benefits through its effect on the vascular (circulatory) system. See the affidavits of testimonial by the patient amici curiae below in the Appendix at A22. Procaine-PVP and its two components, procaine (the ordinary "Novocaine" widely used for dental and other local anesthetic purposes) and PVP, have a long history of safety and absence of harmful side effects. The public controversy which surrounds Dr. DeMarco arises from the question of the efficacy of Procaine-PVP to bring about the kinds of circulatory and protein synthesizing amelioration which Dr. DeMarco claims to have achieved with his patients.[1] Dr. DeMarco has been the focus of continuing attention and harassment by the medical and drug establishment, of which the order below is one episode.

Dr. DeMarco received his Pennsylvania medical license in 1958. He was also licensed to practice medicine in New Jersey and practiced from an office in that state until August 26, 1976, treating Pennsylvania and New Jersey patients.

In August 1976 the New Jersey State Board of Medical Examiners suspended Dr. DeMarco's New Jersey license. He then in January 1977 established an office in Pennsylvania and continued to practice. The Pennsyl-

1. A similar drug based on procaine is widely used in Rumania, West Germany and the state of Nevada with analogously controversial claims and criticism from the medical and drug establishment.

vania board promptly issued to Dr. DeMarco a citation and notice of hearing concerning (1) alleged noncompliance with malpractice insurance requirements and (2) the New Jersey suspension. At a hearing in February, 1977, Dr. DeMarco satisfied the Pennsylvania board that he complied with malpractice insurance requirements. The board deferred action on the suspension charges until the New Jersey board issued a final order.

The New Jersey board held hearings in the Spring of 1977 and, on January 12, 1978, permanently revoked Dr. DeMarco's New Jersey license.

The Pennsylvania board then issued an amended citation and notice of hearing based solely on the New Jersey revocation. The formal "hearing" before the Pennsylvania board was held on March 14, 1978. The only evidence placed in the record by the government were certified copies of the New Jersey revocation of Dr. DeMarco's license in New Jersey. No evidence at all was submitted by the government concerning Dr. DeMarco's substantive performance as a doctor, either in New Jersey or in his Pennsylvania practice after the time he moved his practice to the state in 1977. Dr. DeMarco presented at the hearing unrebutted evidence demonstrating that his Pennsylvania practice was free from any of the allegedly careless procedures which had been seized upon by the State board in the New Jersey proceedings.

In May 1978 the Pennsylvania Board issued its Adjudication and Order revoking Dr. DeMarco's license. The Board relied solely upon a provision of the Pennsylvania Medical Practice Act of 1974, 63 Purd. Stat. § 421.15(a)(4), which, as one of many grounds, makes revocation of a license in another state a ground for revocation in Pennsylvania. In its Adjudication the Board made clear that it was the revocation in New Jersey *alone*—and not any substantive evaluation of Dr.

DeMarco's actual practice, either positive or negative—which led to its result. It stated:

> "Of course, should a New Jersey court reverse the decision and reinstate Respondent's [New Jersey] license, *our basis for revocation would disappear,* as would our order of revocation." (emphasis added) (App. A9).

The Board noted:

> "The Respondent further contends that § 15(a)(4) of the Medical Practice Act . . . is unconstitutional in that it denies the Respondent due process since the hearing held was based upon 'paperwork presentations' of determinations made in another jurisdiction. . . . This Board lacks authority to determine constitutional issues." (App. A9).

The Commonwealth Court of Pennsylvania summarized Dr. DeMarco's due process contention as follows:

> "May the Pennsylvania board revoke a physician's license, without hearing any evidence regarding his practice as a physician in Pennsylvania, solely upon the basis of the revocation of his license in New Jersey for acts which occurred there before he began practice in Pennsylvania." (App. A14).

Therefore, as discussed in the following, the Pennsylvania Board and the Commonwealth Court affirming it, set themselves in direct opposition to a long line of cases in this Court holding that it denies due process to establish an absolute irrebutable presumption which seeks to resolve complex substantive matters by a single inflexible rule.

REASON FOR GRANTING THE WRIT

The Decision Below Deprived Petitioner Without Due Process of His Important Interest in Maintaining His Livelihood By Permitting the State Board to Apply the Irrebutable Presumption That a Revocation of License In Another State Demonstrated Conclusively That Petitioner Was Unfit to Practice Medicine

* * *

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child [here doctor and patient]. It therefore cannot stand." *Stanley v. Illinois,* 405 U. S. 645, 656-57.

* * *

The action of the Board of Medical Examiners below, affirmed by the Commonwealth Court of Pennsylvania, effected the most drastic action that can be aimed at a physician's interest in his practice—it revoked his license and with it his right to practice and heal his patients. As stated in *Bell v. Burson,* 402 U. S. 535, 539, in a much more trivial context:

> "Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensee. In such cases the licenses are not to be

> taken away without that procedural due process required by the Fourteenth Amendment."

In the present case, although the Pennsylvania board went through the formal motions of issuing a notice and of holding a hearing, complete with transcripts, the procedure was a charade. The only operative evidence which the board received and acted upon was the certified report that Petitioner DeMarco's license had been revoked in New Jersey. No evidence at all was placed in the record as to Petitioner DeMarco's substantive competence to perform as a physician.

To understand the seriousness of this due process violation, contravening a long series of decisions by this Court, it is necessary to examine the section of the Medical Practice Act of 1974, 63 Purd. Stat. §§ 421.1 *et seq.*, relied on by the State board and the Commonwealth Court. Power to revoke the license of a physician is granted to the board by 63 Purd. Stat. § 421.15(a). This section contains eight subparagraphs setting forth a variety of specific substantive actions by a physician which can be grounds for revocation of his license. The grounds, other than the one relied on below by the board, were accurately summarized by the Commonwealth Court as:

> "failure to demonstrate qualifications; fraud or deceit; conviction of a felony in Pennsylvania or elsewhere; inability to practice safely by reason of mental or physical inability, drunkenness or drug addiction; violation of regulations; association with violators or unlicensed persons practicing medicine; immoral or unprofessional conduct;"

All of these grounds involve either deliberate behavior by the physician, such as drunkenness, unprofessional conduct or violation of regulations, or public verdict of such behavior by conviction for felony.

The *only* ground in the statute which does not involve such behavior is the very one relied on below—revocation of license by another state. This ground differs from all the others in being a bald surrogate for proof of actual improper behavior by the physician. In short, to the extent it is relied on by itself, as it was by the board and the court below, it constitutes no more than an irrebutable presumption of the supposed existence of the kind of substantive behavior addressed in all the other subsections of the statute. But, if relied on by itself, it impermissibly excuses the government from all burden of proving affirmatively any such improper behavior.

It may well be—and indeed the present case is an example—that the physician in question has an impeccable record of proper practice in the state of Pennsylvania.[2] But for the board, proceeding under this solitary governing ground of the existence of a revocation of license in another state, all of that became irrelevant. The careful notice and hearing provisions of the Pennsylvania statute were made a mockery of, since the sole evidence adduced by the government and relied on by the board below and the Commonwealth Court was a certified copy of the New Jersey revocation of Dr. DeMarco's license. The evils of such trial by irrebutable presumption were well summed up in this Court's early decision in *Tot v. United States*, 319 U. S. 463:

> "Whether the statute in question [establishing a presumption that certain guns had moved in interstate commerce] be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption

2. The only substantive evidence in the record, that presented by petitioner DeMarco, demonstrated this and was not itself rebutted.

> alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision.
>
> Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." 319 U. S. at 469-70.

The *Tot* case was a criminal case and the presumption considered was expressly written into the statute, invalidating the statute as a whole in that case. In the present case the application of the statute by the board perpetuated exactly the same wrong.

The board's reliance on presumption sacrificed individualized determination to cheapness and ease. While the Legislature probably could include the inability of a physician to maintain a license in another state as one status characteristic among others to be weighed all together by the board, it was serious error for the Board to inflate its permission to weigh this factor along with others into an excuse for avoiding any substantive hearing at all on Dr. DeMarco's performance as a physician and to rely exclusively upon the irrebuttable presumption that disqualification in New Jersey justified disqualification in Pennsylvania.

This Court in an important line of cases has repeatedly found due process violations when statutes like the one here either expressly create an irrebuttable pre-

sumption or are applied with that effect. *Tot v. United States*, 319 U. S. 463; *Bell v. Burson*, 402 U. S. 535; *Stanley v. Illinois*, 405 U. S. 645 (irrebuttable presumption that unmarried fathers are unqualified to raise children); *Vlandis v. Kline*, 412 U. S. 441 (irrebuttable presumption that non-residents of Connecticut can never become residents for the purpose of paying lower in-state tuition); *United States Department of Agriculture v. Murry*, 413 U. S. 508 (irrebuttable presumption of lack of need for food stamps); *Cleveland v. Lafleur*, 414 U. S. 642 (irrebuttable presumption that women more than four months pregnant cannot teach school). The principle of these cases has also been applied to a refusal to license a medical practitioner (a psychologist). *Berger v. Board of Psychological Examiners*, 521 F. 2d 1056 (D. C. Cir. 1975). The decision below by both the Board and the Commonwealth Court of Pennsylvania runs directly counter to these decisions of this Court and cavalierly substitutes presumption for process, expediency for individual evaluation, with the result of depriving the petitioning physician of his livelihood and his opportunity to minister to the many patients who actively seek him out. This Court should issue the Writ in order to consider this important instancing of the proper and the improper way to deal with the licensing requirements of one of our most important professions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were served by first class mail, postage prepaid, on William C. Kennedy, Esquire and Paula Garrety, Esquire, counsel for the Respondent on September 24, 1980.

/s/ ROBERT W. MARIS

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Appendix.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

COMMISSIONER OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

BEFORE THE STATE BOARD OF MEDICAL EDUCATION
AND LICENSURE

IN THE MATTER OF THE SUSPENSION OR REVOCATION
OF THE LICENSE TO PRACTICE MEDICINE
LICENSE NO. MD-26088, ISSUED AUGUST 29, 1958,
TO
PETER THOMAS DEMARCO, M.D.

ADJUDICATION AND ORDER

JAMES G. KRAUSE, *Commissioner,*
Professional and Occupational Affairs,
RICHARD C. LYONS, M.D., *Chairman,*
State Board of
Medical Education & Licensure.

STATE CAPITOL
HARRISBURG, PENNSYLVANIA

HISTORY

This case comes before the Pennsylvania State Board of Medical Education and Licensure (hereinafter referred to as the Board), on its amended Citation and Notice of Hearing to Peter Thomas DeMarco, M.D., for violations of the Medical Practice Act, July 20, 1974, P. L. 551, No. 190, § 15, 63 P. S. § 421.15. The amended Citation and Notice of Hearing was issued and served upon the Respondent in accordance with the Administrative Agency Law of June 4, 1945, P. L. 1388, as amended, (71 P. S. § 1710.1 *et seq*).

The Medical Practice Act, July 20, 1974, P. L. 551, No. 190, § 15, (63 P. S. § 421.15), provides:

> "(a) The board shall have authority to refuse, revoke or suspend the license of a physician for any or all of the following reasons:
>
> "(4) Having his license to practice medicine and surgery revoked or suspended or having other disciplinary action taken, or his application for a license refused, revoked or suspended by the proper licensing authority of another state, territory or country."

This Board is in receipt of information that the Respondent was subject to disciplinary proceedings in the State of New Jersey: On August 26, 1976, the New Jersey Board of Medical Examiners issued an order temporarily suspending Respondent's license to practice medicine and surgery in New Jersey; a formal hearing was begun on March 7, 1977, which continued for 27 days before a hearing examiner which resulted in a 100-page report and recommendation from the hearing examiner recommending that the temporary suspension be made permanent and that the Respondent's license to practice medicine in the State of New Jersey be revoked permanently; on

January 12, 1978, the New Jersey Board of Medical Examiners adopted the report and recommendation of the hearing officer and revoked the Respondent's license to practice medicine in that State.

Pursuant to a Citation and Notice of Hearing issued by the Pennsylvania State Board of Medical Education and Licensure and served upon the Respondent, Peter Thomas DeMarco, M.D., Respondent appeared before the Pennsylvania Board on February 18, 1977, to show cause why his Pennsylvania license to practice medicine and surgery should not be suspended or revoked on the basis of allegations brought in counts 1 and 2 of the Citation and Notice of Hearing. At the aforementioned hearing of February 18, 1977, before the Pennsylvania Medical Board, sufficient evidence was presented to show that the allegations in count 1 of the Citation and Notice of Hearing were baseless. Count 2 of that Citation was incorporated into the amended Citation which provides the basis and notice for the formal hearing which took place on March 14, 1978.

A formal hearing was held on March 14, 1978, in Philadelphia, Pennsylvania, with the Respondent, Peter Thomas DeMarco, M.D., appearing before the Board. The Commonwealth was represented by Paula F. Garrety, Esquire, and the Respondent was represented by F. Emmett Fitzpatrick, Esquire, and Nicholas Kozay, Esquire. Charles Ford, Esquire, sat as counsel to the Board. This case was reviewed by the full Board at its meeting held on April 19, 1978. The Board members had reviewed the Notes of Testimony and the exhibits in this matter. Present at the meeting were: Philip Ingaglio, M.D.; John W. Robertson, Jr., M.D.; Audrey Zelkovic, M.D.; Barbara Shore, M.D.; Nathan Hershey, LL.B.; and Richard C. Lyons, M.D., Chairman.

FINDINGS OF FACT

1. The Respondent, Peter Thomas DeMarco, M.D., is the holder of a license to practice medicine, License Number MD-26088, issued August 28, 1958. [N. T. 3 (February 1977), Commn. Exh. 1; N. T. 3 (March 1978), Commn. Exh. 1].

2. The amended Citation and Notice of Hearing was forwarded to the Respondent pursuant to the provisions of the Medical Practice Act, July 20, 1974, P. L. 551, No. 190, § 421.15(c), and the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, 71 P. S. § 1710.1 *et seq.*, and said amended Citation and Notice of Hearing was received by the Respondent. [N. T. 3 (March 1978), Commn. Exh. 1].

3. On August 26, 1976, following a hearing to show cause, the New Jersey State Board of Medical Examiners issued an order temporarily suspending Respondent's license to practice medicine and surgery in the State of New Jersey. [N. T. 9 (February 1977), Commn. Exh 2].

4. A complaint was issued by the State of New Jersey which set forth 54 allegations in 12 counts relating to the Respondent's practice of manufacturing a compound of polyvinyl pyrrolidone and procaine, commonly referred to as Procaine PVP; his practice of injecting this experimental, unproven substance into his patients; and to certain aspects of a hepatitis epidemic in patient population in New Jersey. The complaint alleged that Respondent's actions constitute gross malpractice endangering the lives and health of many persons, professional incompetence, lack of proven moral character, and also violations of the New Jersey Board's temporary suspension order. [N. T. 4 (March 1978) Commn. Exh. 2].

5. On February 18, 1977, a formal hearing was begun in this matter before the Pennsylvania State Board of

Medical Education and Licensure and was continued on that date until such time as New Jersey completed its formal hearing and proceedings and official action was taken by the New Jersey authorities. [N. T. 14 (February 1977].

6. On March 7, 1977, a formal hearing in New Jersey was begun before hearing officer, Judge John J. Francis, to determine whether the charges brought against the Respondent warranted revocation of his license. The hearing continued for 27 days and resulted in a 100-page report and recommendation of the hearing officer. The hearing officer recommended that the August 26, 1977, suspension of Respondent's license be made permanent and that the Respondent's license to practice medicine in New Jersey be revoked permanently. [N. T. 5 (March 1978), Commn. Exh. 3].

7. On January 12, 1978, the New Jersey State Board of Medical Examiners revoked Respondent's license to practice medicine in New Jersey by adopting the hearing officer's recommendations and issuing a final order of revocation. This order incorporates findings that the Respondent was guilty of the following: Using common syringes for inoculation of patients without performing sterilization procedures; using Procaine PVP on patients without physical evidence of its efficacy; using Procaine PVP on patients without first taking and recording patient histories and diagnoses and without maintaining records of patient treatment and progress; making unsubstantiated representations to patients of the efficacy of Procaine PVP; administering Procaine PVP in a manner resulting in 92 cases of hepatitis; failing to abide by the Health Commissioner's directives and orders and failing to cooperate with the New Jersey State Health Department; and failing to abide by the Board's temporary suspension order. [N. T. 5, 38 (March 1978); Commn. Exh. 4].

CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Facts, the State Board of Medical Education and Licensure concludes as follows:

1. The State Board of Medical Education and Licensure has jurisdiction in this case.

2. Respondent was notified of the charges and given ample opportunity to be heard.

3. Findings of Facts Numbers 3 through 7 demonstrate that the Respondent was subjected to lengthy disciplinary proceedings in the State of New Jersey which culminated in the revocation of his license to practice medicine and surgery in that State. Such a disciplinary action taken by the State of New Jersey provides a basis for this Board's action under § 15, 63 P. S. § 421.15(a)(4), which provides:

> "(4) Having his license to practice medicine and surgery revoked or suspended or having other disciplinary action taken, or his application for a license refused, revoked or suspended by the proper licensing authority of another state, territory or country."

And, therefore, provides the basis in law for the conditions set forth in the Order.

DISCUSSION

The Findings of Fact and Conclusions of Law make it clear to the Board that the Respondent, having had his license to practice medicine revoked in the State of New Jersey, is in violation of the Medical Practice Act, Act of July 20, 1974, P. L. 551, No. 190, § 15 [63 P. S. § 421.15 (a)(4)], and provides a clear basis for the Order set forth by this Board.

The issues raised in the lengthy New Jersey proceedings culminating in the revocation of Respondent's medical license in that State are of particular concern to this Board since Respondent has moved his practice within the jurisdiction of this Commonwealth. This Board purposely delayed taking action against the Respondent's license in this Commonwealth until such time as he was afforded a full due process proceeding in the State of New Jersey resulting in a final action taken on his license in that State. While New Jersey was able to temporarily suspend the Respondent's license for the duration of its proceedings, the Pennsylvania State Board does not have such summary powers and, consequently, the Respondent continued to practice in Pennsylvania without sanction from this Board during the pendency of the New Jersey proceedings. Immediately upon notification of the order of revocation by the New Jersey Board of Medical Examiners, this Board issued its Citation to the Respondent to appear before the Board for formal hearing.

This Board heard this case on March 14, 1978, and reviewed the transcript of the hearing together with the exhibits entered by the Commonwealth and the Respondent, together with supporting memoranda of law and briefs at its meeting on April 18-19, 1978. The records supports the conclusion by the overwhelming weight of evidence that the Respondent, while licensed in both New Jersey and Pennsylvania, though practicing only in New Jersey, was guilty of a conscious and reckless indifference to the health and safety of his patients, deviated from standard practices of medical care in their treatment, recklessly and willfully endangered his patients' lives, and inexcusably departed from minimal standards of care and treatment required of a practicing physician in any state. Respondent willfully violated the requirements of the Federal Food, Drug and Cosmetic Act in his utilization of an unapproved drug in the treatment of human beings.

He consciously ignored and defied all orders to cease and desist from his injecting practice of Procaine PVP. He made representations to his patients of the remedial effects of his drug without undertaking any examinations or making diagnoses and without so much as a simple medical history. Knowing of the existence of hepatitis among his patients and knowing of the possibility of transmission of this disease through reusable syringes or needles without intervening sterilization, he recklessly ignored warnings and continued his injection practices. He willfully disregarded statutory duties in failing to report cases of hepatitis that came to his attention and was grossly indifferent to the warnings that hepatitis was being transmitted in his practice. He also failed to maintain records of patients' conditions and courses of treatment which further endangered their lives. We rely on the action and adjudication issued by the New Jersey State Board of Medical Examiners in reaching these determinations.

Respondent contends in his brief that this Board has no basis upon which to proceed because the evidence and incidents which led to the New Jersey action occurred in that State and that no testimony was introduced to prove that these matters continued in the Respondent's present practice in Pennsylvania. Respondent fails to state that during the years these events transpired in New Jersey, Respondent was licensed in this Commonwealth as well and subject to this Board's jurisdiction. He practiced in New Jersey but held licensure in both New Jersey and Pennsylvania. Consequently the nature of his practice, regardless of its location, has an effect on his licensure status in all states. In addition, under § 15(a)(4) of the Medical Practice Act, we are entitled to rely on the record, findings and conclusions arrived at by our sister state, New Jersey. This procedure makes much sense. We should not have to duplicate the efforts of another state

to determine that a physician found incompetent in that state should not be permitted to practice in our State.

The Respondent further contends that § 15(a)(4) of the Medical Practice Act, supra, is unconstitutional in that it denies the Respondent due process since the hearing held was based upon "paperwork presentations" of determinations made in another jurisdiction. This section provides this Board with the basis upon which to bring Respondent before it to be heard. This section does not abdicate the Board's power to another jurisdiction because this Board is not compelled under this section to automatically adopt the findings or determinations of the other state's board. It does provide this Board with the power to review disciplinary actions relating to Pennsylvania licensees which have taken place in other states and to make independent determinations based on the facts presented and determinations reached in the other state, with concern directed to his licensure status in Pennsylvania. This we have done, and have been persuaded by the adjudication rendered in New Jersey. The question of the constitutionality of this provision is something this Board has no power to address. This Board lacks authority to determine constitutional issues. *Philadelphia Life Insurance Company v. Commonwealth,* 410 Pa. 571 (1963); *Borough of Greentree v. Board of Property Assessment,* 459 Pa. 268 (1974); *Township of Springdale v. Kane,* 11 Comm. Ct. 254 (1973). Boards such as the Medical Board have been held not to be competent tribunals to pass on the validity or constitutionality of their enabling statutes and the determination of such questions by such administrative tribunals has been held to be clearly not within the legislative purview, *Philadelphia Life Insurance Company v. Commonwealth,* supra, at page 580. Of course, should a New Jersey court reverse the decision and reinstate Respondent's license, our basis for revocation would disappear, as would our order of revocation.

Finally, the Respondent contends that this Board, having initiated an action against this Respondent in February of 1977, had essentially sanctioned his practice and has already acted in this matter in that they did not prohibit his practice at that time. This Board on February 18, 1977, began this hearing on the basis of the temporary suspension in the State of New Jersey and determined to continue the matter until such time as the New Jersey Board issued a final order rather than the temporary suspension order. At no time did this Board issue a final order as a result of matters addressed on February 18, 1977. Further, this Board is an agency independent of the Pennsylvania Department of Health and is not subject to any procedures or guidelines that that Department might have imposed upon the Respondent's practice. At no time did this Board sanction the Respondent's practice in Pennsylvania nor did it make a final determination in this matter until the issuance of this Order.

The following Order is hereby entered:

ORDER

AND NOW, this 24th day of May 1978, on the basis of the aforementioned Findings of Fact, Conclusions of Law, and Discussion, the State Board of Medical Education and Licensure, having duly convened and considered these entire proceedings, by majority vote of its members, hereby orders that the license to practice medicine of Peter T. DeMarco, M.D., License Number MD-26088 be revoked. Respondent shall, consistent with this Order, forthwith tender to this Board his engrossed certificate, current registration and Federal Controlled Substances registration, and it is further ordered that the Respondent shall forthwith and permanently cease, desist and refrain from holding himself out as a licensed physician and shall

cease, desist and refrain from engaging in the practice of medicine and surgery in the Commonwealth of Pennsylvania.

BY ORDER

PROFESSIONAL AND OCCUPATIONAL AFFAIRS	STATE BOARD OF MEDICAL EDUCATION AND LICENSURE
/s/ JAMES G. KRAUSE James G. Krause, *Commissioner*	/s/ RICHARD C. LYONS, M.D. Richard C. Lyons, M.D., *Chairman*

Attorney: William C. Kennedy

COMMONWEALTH COURT OF PENNSYLVANIA

No. 1278 C. D. 1978

PETER T. DeMARCO, M.D.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,

Respondent.

Argued April 5, 1979.
Decided Dec. 4, 1979.

OPINION

Before MENCER, ROGERS and CRAIG, *JJ.*

CRAIG, *Judge.*

This petition for review seeks reversal of an adjudication and order of the State Board of Medical Education and Licensure (Pennsylvania board) which revoked petitioner's license to practice medicine in Pennsylvania.

Petitioner had received his Pennsylvania medical license on August 28, 1958. Also licensed in New Jersey, his medical practice was conducted exclusively from an office in that state, but with Pennsylvania as well as New Jersey patients, until August 26, 1976, at which time the New Jersey State Board of Medical Examiners (New Jersey board) suspended his New Jersey license.

Beginning in January, 1977, petitioner established his office in Morrisville, Pennsylvania and continued to prac-

tice. The Pennsylvania board issued to petitioner a citation and notice of hearing based upon (1) alleged noncompliance with malpractice insurance requirements and (2) the New Jersey suspension. At a hearing in February, 1977, petitioner satisfied the Pennsylvania board that he complied with malpractice insurance requirements, and that board deferred action on the suspension charges until the New Jersey board issued a final order.

The New Jersey board held 27 days of hearings between March 7 and May 3, 1977 and, on January 12, 1978, pursuant to the recommendation of its hearing officer, the New Jersey board revoked petitioner's New Jersey license.[1] One of the causes for the revocation was hepatitis among petitioner's patients, found by the New Jersey board to have resulted from unprofessionally insanitary practices.

The Pennsylvania board then issued an amended citation and notice of hearing based on the New Jersey revocation.

The Pennsylvania board's formal hearing was held March 14, 1978, at which evidence of the New Jersey revocation was admitted. The authenticity of the evidence of the New Jersey revocation is not subject to question because the New Jersey documents were authenti-

1. Petitioner appealed the final order of the New Jersey board to the Superior Court of New Jersey, Appellate Division, to whom his appeal had been submitted before argument was held before us. Thereafter, in accordance with Pa. R. A. P. 2501(b), we were provided with a copy of a decision of the Superior Court of New Jersey, Appellate Division, *In the Matter of the Suspension or Revocation of the License of Peter T. DeMarco, M.D. to Practice Medicine and Surgery in the State of New Jersey*, (No. A-2321-77, decided July 5, 1979) which has affirmed the revocation order of the New Jersey board. Therefore, any question concerning the pendency of petitioner's appeal before the New Jersey courts is moot.

cated by the presentation of duly certified copies. Act of February 21, 1834, P. L. 68, § 1, repealed, Act of April 28, 1978, P. L. 202, No. 53, § 2(a), effective June 27, 1978, *formerly* 28 P. S. § 91. Petitioner presented only evidence relating to certain official supervision and monitoring of his practice by the Pennsylvania Department of Health, designed to prevent problems of the sort which had occurred in New Jersey, including the outbreak of hepatitis.

On May 24, 1978, the Pennsylvania board issued its adjudication and revocation order which is the subject of this appeal. The Pennsylvania board based its action upon Section 15(a)(4) of the Medical Practice Act of 1974,[2] 63 P. S. § 421.15(a)(4), which reads:

> "(a) The board shall have authority to refuse, revoke or suspend the license of a physician for any or all of the following reasons:
> "
> . . . .
>
> "(4) Having his license to practice medicine and surgery revoked or suspended or having other disciplinary action taken, or his application for a license refused, revoked or suspended by the proper licensing authority of another state, territory or country."

The only issue raised by petitioner may be summarized as:

May the Pennsylvania board revoke a physician's license, without hearing any evidence regarding his practice as a physician in Pennsylvania, solely upon the basis of the revocation of his license in New Jersey for acts which occurred there before he began practice in Pennsylvania?

Our review of the board action of May, 1978 is governed by Section 44 of the previous Administrative

2. Act of July 20, 1974, P. L. 551, *as amended.*

Agency Law,[3] *formerly* 71 P. S. § 1710.44, then applicable, which, in the same terms as the current provision in 2 Pa. C. S. § 704, provided that we shall affirm the adjudication unless it is in violation of constitutional rights, otherwise not in accordance with law, or a necessary finding is not supported by substantial evidence.

The Pennsylvania board, as respondent here, does not dispute petitioner's premise that, with respect to revocation of his professional license, petitioner must be afforded due process, including due notice of the charges and an opportunity to be heard. *See State Board of Medical Education and Licensure v. Grumbles,* 22 Pa. Cmwlth. 74, 347 A. 2d 782 (1975).

However, because petitioner has cited no authority whatsoever,[4] we have difficulty in crystallizing the precise nature of petitioner's due process attack. Petitioner does not now expressly state the question in terms of claiming that Section 15(a)(4) of the Medical Practice Act is unconstitutional, as he did before the Pennsylvania board. Nor does petitioner raise any question as to the nature or quantum - - - or indeed the truth - - - of the evidence from New Jersey. His complaint is that the Pennsylvania board revoked his license "without hearing any evidence regarding his practice . . . in . . . Pennsylvania." By that claim, he does not seem to be alleging that he was denied

3. Act of June 4, 1945, P. L. 1388, *repealed* by Act of April 28, 1978, P. L. 202, § 2(a), [1244] effective June 27, 1978.

4. Amicus curiae, S. O. S. Association, Inc., an organization composed of petitioner's patients, has not addressed the issue raised by petitioner but has raised a new question, in essence: May a state statute deprive patients of the care of a physician who is the only source of a certain drug for them, by revoking his license instead of employing less drastic action? Clearly, aside from the very substantial problem of whether such patients have any legal interest, they cannot raise a question which petitioner himself has not presented to us.

notice or hearing or that he was barred from presenting evidence of his professional activities in his *defense*; the gravamen of his attack is that the revocation was not based upon any presentation by the Commonwealth of evidence of Pennsylvania activities, but only upon evidence of matters which occurred *outside* Pennsylvania and *before* he established a practice in Pennsylvania.

We can only view the Pennsylvania statute as providing in effect that, whenever a physician licensed in Pennsylvania has also obtained a medical license elsewhere, he is under a burden to remain in good standing in that other jurisdiction, and his failure to do so, at least for reasons which would warrant revocation in Pennsylvania, can justify withdrawal of his Pennsylvania license to practice.

Viewing that particular subsection, Section 15(a), in its entirety, we note that it authorizes refusal, suspension or revocation of a physician's license for such reasons as: failure to demonstrate qualifications; fraud or deceit; conviction of a felony in Pennsylvania or elsewhere; inability to practice safely by reason of mental or physical inability, drunkenness or drug addiction; violation of regulations; association with violators or unlicensed persons practicing medicine; immoral or unprofessional conduct; and, as pertinent to this case, revocation of license by another state or country.

We agree with the Commonwealth that the action taken here did not amount to a delegation of the authority of the Pennsylvania board to the New Jersey board. Nothing in the statute mandates revocation in Pennsylvania because of a license revocation elsewhere; the statute is clearly an authorization to the Pennsylvania board, not a command.

A reading of the decision of the Pennsylvania board confirms that it thus viewed its powers and duties. The

Pennsylvania board did not deem itself compelled to revoke petitioner's license because of the New Jersey action; it ordered revocation of the Pennsylvania license because the New Jersey revocation had taken place for reasons which could well be summarized as unprofessional conduct under Pennsylvania law, as well as under New Jersey law.

Petitioner has made no claim that the conduct which resulted in the New Jersey revocation would fall short of grounds for license revocation if it had occurred in Pennsylvania. Petitioner's attack, as noted above, is not directed at the substance of the New Jersey findings as to the history of his actions in New Jersey, but to the geographical and chronological distinctions - - - that those things happened outside Pennsylvania and before he had a practice in Pennsylvania.

Clearly, geographical distinctions are irrelevant to the quality of professional conduct. Failure to conduct oneself professionally outside the jurisdiction, or failure to maintain professional good standing outside the jurisdiction, is fully relevant to the acceptability of a professional licensee in Pennsylvania.

Appropriate and persuasive is a New York case upholding the revocation of an optometrist's New York license for acts committed in California, stating:

> "The board did not exceed its authority in proceeding on acts committed outside New York. The statute does not speak on this point (see Education Law, § 6509), but to the extent regulation of the profession is undertaken in order to preserve high ethics within the professions, *it would make no sense to require the regulatory agency to ignore misconduct committed outside this State.* Petitioner does not dispute that the fraudulent acts he has admitted

would constitute misconduct if performed in this State." (Emphasis added.) *Miles v. Nyquist*, 60 A. D. 2d 133, 400 N. Y. S. 2d 868, 871 (1977).

Similarly, as to the chronological point, unprofessional conduct or loss of professional status before commencing practice in Pennsylvania is clearly relevant to continued qualification here, except where such conduct or loss has been extremely remote in time, which was not the case here. Moreover, the conduct in question took place during the period that petitioner held a Pennsylvania license.

To the contention that conduct outside the jurisdiction of office location is immaterial, the succinct answer is that the current office location itself could be immaterial, but the professional actions and professional status, wherever and whenever existing, of a physician entrusted to practice medicine in Pennsylvania, are relevant indeed.

We therefore affirm the adjudication and order of the State Board of Medical Education and Licensure.

COMMONWEALTH COURT OF PENNSYLVANIA

No. 1278 C. D. 1978

PETER T. DeMARCO, M.D.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,

Respondent.

ORDER

AND Now, this 4th day of December, 1979, the Adjudication and Order of the State Board of Medical Education and Licensure dated May 24, 1978, relating to petitioner herein, is affirmed. This court's order of supersedeas, dated June 19, 1978, is dissolved.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PETER T. DEMARCO, M.D.,
Petitioner

v.

THE PENNSYLVANIA STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,
Respondent

NO. 4698
ALLOCATUR DOCKET

May 5, 1980. Petition for Allowance of Appeal Denied. Stay Order vacated.

Per Curiam.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PETER T. DEMARCO, M.D.,
Petitioner

v.

THE PENNSYLVANIA STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,
Respondent

NO. 4698
ALLOCATUR DOCKET

June 27, 1980. Application for Reconsideration denied.

Per Curiam.

AFFIDAVITS

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I, BENJAMIN W. SCHWARTZ, Judge of the Court of Common Pleas of Philadelphia County, First Judicial District, being duly sworn according to law deposes and says that I am a patient of Peter T. DeMarco, M.D. and have been such for approximately 11 years and have been treated with Dr. DeMarco's medicine Procaine PVP for a heart condition, which has improved tremendously through the years. Continued denial of this drug will present clear and permanent damage to my health and life.

Furthermore, my wife, Shirley G. Schwartz has been a patient of Peter T. DeMarco, M.D. and has been such for approximately 11 years and has been treated with Dr. DeMarco's medicine, Procaine PVP for angina pectoris and her condition improved remarkably. Since Dr. DeMarco has been prevented from administering Procaine PVP, her condition has begun to deteriorate and continued denial of this drug will present clear and permanent damage to her health and life.

/s/ BENJAMIN W. SCHWARTZ
Benjamin W. Schwartz

Sworn to and Subscribed
before me this 14th day
of May 1978.

(illegible)

Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires September 14, 1978

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I am PENNY SEIFERT, 2005 Yardley Road, Yardley, Pennsylvania, 19167. I am 52 years old. I am retired from SEPTA as a bookkeeper on a disability after working for them for sixteen years.

I first had a blood clot in 1943. Around 1951 I started to have regular problems of a cardio vascular nature. Medicine for this condition caused blood in my urine and bleeding of the bursa. My condition was so bad that my doctors had to take me off medicine due to the side effects of the medicine. In 1971 I was told by my physicians there was nothing they could prescribe for me. They told me that all I could expect would be a thickening of my blood until I had a fatal blood clot.

It was at this point I went to Dr. DeMarco (1971). After a series of treatment of Procaine PVP my condition improved immeasurably. The extended blue veins in my chest went away. My left leg which was previously numb returned to normal. I was able to work again.

Since I have been unable to receive Procaine PVP my legs have swelled and have ulcerated. The vein in my chest is once again noticeable.

I am unable to receive Procaine PVP from any other source other than from Dr. DeMarco.

/s/ PENNY SEIFERT
Penny Seifert

Sworn to and subscribed
before me this 22nd day
of May, 1978.

(illegible)

Notary Public
My Commission expires: June 4, 1979

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

I am LUCY WEBSTER, 3563 Teton Road, Philadelphia, Pennsylvania. I am a homemaker. I have two children ages 16 years and 12 years. I am 39 years old.

I started in May, 1977 to go to Dr. Peter DeMarco for scleroderma. This is a deterioration of connective tissues. I had this condition for fifteen years prior to seeing Dr. DeMarco.

The Procaine PVP treatment helped me tremendously. Pain was relieved, the sores were healed. The Procaine PVP not only arrested the condition but it improved it.

Since the embargo my condition has worsened. Sores have reappeared. My fingers are rotting away without the Procaine PVP. I have tried numerous other physicians but no other treatment other than Procaine PVP has helped me. As far as I know there is no other source of Procaine PVP other than from Dr. DeMarco.

/s/ LUCY WEBSTER
Lucy Webster

Sworn to and subscribed
before me this 22nd day
of May, 1978.

(illegible)

Notary Public
My Commission expires: June 4, 1979

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

I am HELEN FERGUSON, 38 Harvest Road, Levittown, Pennsylvania. I am 41 years old. I am a housewife and have five children, ages 21 years, 18 years, 17 years, 15 years, and 12 years.

In February, 1977, I had two toes on my left foot amputated for gangrene. My foot would not heal. I had been receiving treatment for circulation problems since December, 1976.

After my toes were amputated, my physician wanted to amputate my left leg. I checked out of the hospital (Albert Einstein Medical Center, Northern Division, Philadelphia). Several days later I started treatment with Dr. DeMarco. The principal treatment had been Procaine PVP. Within three months my foot began to heal. It is now almost completely healed. By September 1977 I was out of the wheel chair. I can now walk unassisted.

Since there has been an embargo on Procaine PVP which prevents me from receiving treatment I have noticed pain in my left foot. I am fearful that unless I receive continued treatment of Procaine PVP my former condition my return.

/s/ HELEN FERGUSON
Helen Ferguson

Sworn to and subscribed
before me this 22nd day
of May, 1978.

(illegible)

Notary Public
My Commission expires: June 4, 1979

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I, EDWARD BRALYNSKI, 59 years of age, reside on the corner of 1002 Clinton and Division Streets, Trenton, New Jersey. I am self-employed.

I suffered a myocardial infarction in the year 1959, and also suffered with severe leg cramps due to poor cir-

culation. I sought relief from a number of Doctors to no avail.

In the year of 1966, I heard of Dr. DeMarco and his Procaine P. V. P. It has proven to be the only method of treatment that has been beneficial to me, therefore I have continued treatment of Procaine P. V. P. injections to this date.

Since the embargo has been placed on Dr. DeMarco's Procaine P. V. P., I feel myself deteriorating to the point that I am unable to function to my normal capacity. I have 25% vision in my eyes and I am fearful that I will eventually lose my vision if I do not continue with Dr. DeMarco's P. V. P.

In conclusion, I feel that as a citizen of the United States, I should have the right to avail myself to whatever treatment that has proven to be of medical value to me. Dr. DeMarco should, therefore, be allowed to continue to practice medicine and administer his serum to myself and to those patients who desire such treatment.

/s/ EDWARD BRALYNSKI
Edward Bralynski

Sworn to and subscribed
before me this 25th day
of May, 1978.

/s/ VICTORIA J. MARTIN

Notary Public of New Jersey
My Commission Expires August 27, 1980

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I, LOUIS P. RUSSO, am 60 years of age and a farmer. I own and operate a 160 acre fruit and vegetable farm in Lumberton, New Jersey. I employ approximately 20 persons at the height of the season.

For the past eight years, Dr. Peter T. DeMarco has been treating me for atherosclerosis with bi-weekly injections of Procaine P. V. P. For the first few years of being treated with P. V. P., I continued periodic checkups with my cardiologist, i.e. blood tests, EKG's, etc. Having suffered a myocardial infarction, my cardiologist recommended that I sell my farm and not work again. He put me on a very strict diet and a number of pills. With Dr. DeMarco's P. V. P., I no longer stayed on the diet or the pills. When I returned for periodic checkups (at Dr. DeMarco's request), the cardiologist was amazed at my progress, although he was unaware of the P. V. P. treatment. I found myself working harder than ever with much energy.

Now that I have been denied treatment of P. V. P. since the embargo, I feel that I am not able to function to my normal capacity. I have reduced my farming operation to ⅓ of its production thereby reducing the employees. I feel tired most of the day and disoriented at times. I feel that due to poor circulation of my blood, it has led to my extreme fatigue and occasional angina pains.

Many people depend on the farm for their livelihood. If I am unable to operate it because I am physically unable, I will be forced to retire and sell out.

I would like to go on record as having the utmost confidence in Dr. Peter T. DeMarco and his Procaine P. V. P. I know of no other source to obtain this medication.

/s/ Louis P. Russo
Louis P. Russo

Sworn to and subscribed
before me this 25th day
of May, 1978.

/s/ Victoria J. Martin

Notary Public of New Jersey
My Commission Expires August 27, 1980

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I am HELEN PESCE. I live at 222 Dutch Neck-Edinburg Road in Trenton, New Jersey. I have two stepsons aged 13 years and 17 years. I work part-time as a receptionist. I am 52 years old.

For approximately fifteen years, I suffered from extreme physical fatigue and arthritis. I sought the advice of several doctors and received a variety of treatments none of which worked to my benefit.

Finally, in 1972, I began to be treated by Dr. DeMarco and received regular shots of Procaine PVP. I immediately began to see a marked improvement. My energy level increased dramatically and the cramps I had experienced for years completely disappeared.

I have been unable to obtain Procaine PVP since January, 1978 and since then the cramps have resumed in my right leg, again making it difficult to walk. Since I have been unable to obtain Procaine PVP, I again experience extreme fatigue. No other treatment but Procaine PVP has helped me.

/s/ HELEN PESCE
Helen Pesce

Sworn to and subscribed
before me this 22nd day
of May, 1978.

/s/ BEVERLY L. SCHWEIDEL
Notary Public

My Commission expires: June 4, 1979

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

I, JOSEPH J. RUTKOWSKI, 68 years of age, reside at 922 Brunswick Avenue, Trenton, New Jersey, 08638. I am self-employed.

I suffered with migraine headaches for as long as I can remember. I have seen many doctors and have had much medication without any relief whatsoever.

In 1963 I experienced symptoms of a heart attack. I had a complete physical by a Doctor in September of 1963. I was told that I was physically "ok" and that I had no heart trouble. On the very next day, I was rushed to a hospital with a myocardial infarction. After this experience, I sought another heart specialist. I was under the care of this specialist for three years and for the three years I could not work. I was always tired and weak.

I read an article about a patent awarded to Dr. Peter DeMarco for his Procaine P. V. P. I got in touch with Dr. DeMarco and after two or three weeks of P. V. P. injections, I felt better than I normally did before the heart attack. No more headaches, prostate trouble subsided, kidney trouble subsided, pep and better health returned. I started to work full time and resumed playing golf—many times 36 holes a day. No more strict diets and began eating bacon, ham, liver and all those foods that were before forbidden.

In the last three years I also survived two surgeries, (Prostate and Kidney) and after each surgery case I played golf within two or three weeks.

Since the embargo was placed on Dr. DeMarco's office, I am suffering more frequent migraine headaches, fatigue, angina pains and circulatory problems. My leg now has an open sore. In all the previous years of medication before P. V. P., I had no relief or help. Because of my circulatory problem, I am not looking forward to

suffering or possible amputation. Since I am at your mercy I hope that you rule favorably.

/s/ JOSEPH J. RUTKOWSKI
Joseph J. Rutkowski

Sworn to and subscribed
before me this 24th day
of May, 1978.

/s/ VICTORIA J. MARTIN

Notary Public of New Jersey
My Commission Expires August 27, 1980

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I am MARGARET PICCONE. I live at 35 Gilmore Road, Trenton, New Jersey. I am 50 years of age and a housewife.

Since 1967, I have suffered pain with phlebitis in my left leg. My family physician treated the condition for ten years.

In January, 1977, while immobolized with phlebitis, both legs became extremely painful and cold. I consulted another physician and he prescribed different medications which did not relieve my condition. I was referred to a vascular surgeon who told me that my veins were closing up and if I didn't get them opened, I would get gangrene.

I started receiving shots of Procaine P. V. P. on February 21, 1977. I felt relief in one week of the lightening sharp pain and by March 28, 1977, I was completely free of pain.

Since mid-January, 1978, when I was denied Procaine P. V. P., by the State of Pennsylvania embargo, I have

had reoccurrences of swelling and pain caused by a ten year old kidney disease and re-occurrences of arthritic pain in my right arm for which I am being treated with pills.

Procaine P. V. P. is the only drug that has helped my ten year old illnesses.

/s/ MARGARET PICCONE
Margaret Piccone

Sworn to and subscribed
before me this 23rd day
of May, 1978.

(illegible)

Notary Public of New Jersey
My Commission Expires July 4, 1979

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

I am MONT B. FREEMAN. I live at 122 Weber Avenue, Trenton, New Jersey. I am 58 years of age and I was employed as a truck driver for Roller Bearing Company of America.

I developed gangrene in my left foot in August of 1977. On or about the 1st of December, 1977, I sought relief for my condition by getting eighteen injections of Procaine P. V. P. My three toes had begun to heal within a week's time. January 19, 1978, Dr. DeMarco's office was closed and I did not receive any injections thereafter. I noticed severe regression in February and my cardiovascular surgeon scheduled me to have my left foot amputated six inches below the knee in March, 1978.

I feel that if I had continued treatment with Procaine P. V. P., I may not have had to have my foot amputated.

I would like to have this medication available to me in the event that I have a reoccurrence of gangrene.

I know of no other source to secure Procaine P. V. P. other than from Dr. DeMarco.

/s/ MONT B. FREEMAN
Mont B. Freeman

Sworn to and subscribed
before me this 23 day
of May, 1978.

(illegible)

Notary Public of New Jersey
My Commission Expires July 4, 1979

Supreme Court, U. S.
FILED
OCT 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-476

In the Supreme Court of the United States

October Term, 1980

PETER T. DeMARCO,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, STATE BOARD OF MEDICAL EDUCATION AND LICENSURE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF COMMONWEALTH OF PENNSYLVANIA

KENNETH E. BRODY
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TABLE OF CONTENTS

	PAGE
Counter-Statement of Question Involved	1
Counter-Statement of the Case	2
Reason for Denying the Writ	5
Conclusion	11

TABLE OF CITATIONS

CASES:

Barsky v. Board of Regents of New York, 374 U.S. 442 (1954)	9, 10
Miles v. Nyquist, 60 A.D. 2d 133, 400 N.Y.S. 2d 868	7
Selling v. Radford, 423 U.S. 46 (1917)	6

CONSTITUTIONAL PROVISION:

United States Constitution, 14th Amendment	9

STATUTE:

Medical Practice Act of 1974, Act of July 20, 1974, P.L. 551, No. 190, as amended (63 P.S. §421.15)	4, 5

COUNTER-STATEMENT OF QUESTION INVOLVED

Does disciplinary sanction against a physician in one state based upon disciplinary sanction against that physician in another state provide the physician with due process of law when the latter disciplinary sanction is based not only upon the fact of the previous disciplinary sanction, but also upon a consideration of the reasons for that sanction?

COUNTER-STATEMENT OF THE CASE

Since August 28, 1958, until May 24, 1978, Peter T. DeMarco held a license to practice medicine and surgery in the Commonwealth of Pennsylvania. While he continued to maintain a license in Pennsylvania, he also secured a license in New Jersey and chose to establish his practice in that state. He continued to practice in New Jersey until his license there was summarily suspended on August 26, 1976.

In January, 1977, when he could no longer practice in New Jersey, Dr. DeMarco moved his practice across the border to Morrisville, Pennsylvania. Immediately, the Pennsylvania Board of Medical Education and Licensure (hereinafter referred to as the Board) issued a citation and notice of hearing to Dr. DeMarco based upon the summary suspension of his license by the New Jersey State Board of Medical Examiners and his apparent failure to comply with Pennsylvania's malpractice insurance requirements.

The Board began a hearing on these matters in February, 1977, at which time Dr. DeMarco provided evidence of compliance with the malpractice insurance requirements. Since the New Jersey State Board of Medical Examiners had yet to provide Dr. DeMarco with a final hearing relating to his activities there, the Board believed its citation premature and chose to postpone formal action until such time as the New Jersey Board issued a final order in the matter. During this time, Dr. DeMarco continued to practice in Pennsylvania.

The New Jersey Board began holding disciplinary hearings on March 7, 1977, and the hearings continued for twenty-seven (27) days ending on May 3, 1977. Decision was reserved and approximately 150 pages of briefs and 39 volumes of testimony were submitted to the hearing officer. The hearing officer's recommendation and report was submitted to the New Jersey Board in December, 1977. It details findings of gross incompetency in the practice of medicine in that Dr. DeMarco was found to have utilized common syringes for inoculation without performing proper sterilization procedures; to have used an experimental and unproven drug, Procaine PVP, on his patients without evidence of its efficacy and without performing proper histories and physical examinations; and to have administered Procaine PVP in an unsanitary manner resulting in ninety-two (92) reported cases of hepatitis in his patient population. The New Jersey Board issued an order of revocation on January 12, 1978.

Immediately upon receipt of this order, the Pennsylvania Board issued an amended citation and notice of hearing. A formal hearing was held before the Board on March 14, 1978. In its case in chief, the Commonwealth presented evidence of the charges brought against Dr. DeMarco in New Jersey; the order of the New Jersey Board revoking Dr. DeMarco's license; and the report of the New Jersey hearing examiner which was adopted by the New Jersey Board and which specified the reasons for revocation. The report of the New Jersey hearing examiner contained an analysis of the evidence presented before him, his specific findings of facts and conclusions of law, and the reasons he presented for each of his findings of facts, conclusions of law and recommendation to revoke

Dr. DeMarco's license to practice as a physician in New Jersey.

On April 18, 1978, the Board voted to revoke Dr. DeMarco's license. Disciplinary action was predicated upon violation of Section 15 (a) (4) of the Medical Practice Act, Act of July 20, 1974, P.L. 551, No. 190, as amended, 63 P.S. §421.15, which proscribes having one's license to practice medicine or surgery suspended or revoked in another jurisdiction. Revocation was the sanction decided upon because the Board concluded that Dr. DeMarco's conduct in New Jersey involved gross departures from acceptable standards of medical practice in Pennsylvania as well as in New Jersey (A. 5 Finding of Fact 7, A. 7). On May 24, 1978, the Board issued the adjudication and order of revocation, which was the basis for the petition for review in the Pennsylvania Commonwealth Court, ensuing petitions for allowance of appeal and applications for reconsideration to the Supreme Court of Pennsylvania, and is the basis for this petition for writ of certiorari.

REASON FOR DENYING THE WRIT

Disciplinary sanction against a physician in one state based upon disciplinary sanction against that physician in another state does not deny the physician due process of law when the latter disciplinary sanction is based not only upon the fact of the previous disciplinary sanction, but also upon a consideration of the reasons for that sanction.

In the disciplinary proceeding before the Board, Petitioner was found guilty of violating Section 15 of the Medical Practice Act of 1974, *supra,* which provides:

> "(a) The board shall have authority to refuse, revoke or suspend the license of a physician for any or all of the following reasons:
>
> * * *
>
> "(4) Having his license to practice medicine and surgery revoked or suspended or having other disciplinary action taken, or his application for a license refused, revoked or suspended by the proper licensing authority of another state, territory or country."

Petitioner contends that the proceeding before the Pennsylvania Board, as conducted, deprived him of property without due process of law. He argues that the Board was unable to exercise its discretion on the basis of the evidence that it had before it and that it accepted a revocation of his license in another state as an irrebuttable

presumption that he was unfit to practice medicine in Pennsylvania.

There was no presumption that Petitioner had his license to practice medicine revoked in New Jersey. Revocation of his license in New Jersey is a matter of uncontroverted fact. In the proceeding before the Board, the Commonwealth presented no evidence of improper conduct within the geographic borders of Pennsylvania; however, geographic distinctions are irrelevant when considering how departures from acceptable standards of medical practice impact upon a physician's fitness to continue to practice medicine.

In *Selling v. Radford,* 243 U.S. 46 (1917), this Court considered a petition to disbar a member of the Bar of the Supreme Court of the United States based upon his previous disbarment by a State Court for personal and professional misconduct. In addressing the question of how the attorney's conduct before the Bar of another jurisdiction impacts upon his fitness to practice before the Bar of the Supreme Court of the United States, this Court stated:

> ". . . the continued possession of a fair private and professional character is essential to the right to be a member of this Bar. It follows, therefore, that the personality of the member and these inherent and prerequisite qualifications for membership of this Bar are indivisible; that is, inseparable. They must, if they exist, follow the personality of one who is a member of the Bar, and hence their loss by wrongful personal and professional conduct, wherever committed, operates everywhere, and must, in the nature of things, furnish adequate reason in every jurisdiction for taking away the right to continue to be a member of the Bar in good standing." (Id. at 49.)

In addressing the issue of the relevancy of improper conduct committed by a physician in a geographic area outside of Pennsylvania, the Commonwealth Court in its opinion cites from *Miles v. Nyquist,* 60 A.D. 2d 133, 400 N.Y.S. 2d 868, 871 (1977), which upheld the revocation of an optometrist's New York license for acts committed in California.

> "The Board did not exceed its authority in proceeding on acts committed outside New York. The statute does not speak on this point (s. Education Law §6509), but to the extent regulation of the profession is undertaken in order to preserve high ethics within the professions, *it would make no sense to require the regulatory agency to ignore misconduct committed outside this state.* Petitioner does not dispute that the fraudulent act he has committed would constitute misconduct if performed in this state." (Emphasis added.) (A. 17-18)

The Board was presented with an abundance of evidence as to Petitioner's misconduct in New Jersey and as to why his license was revoked in that state. The Commonwealth presented the New Jersey citation, the instrument which formalized the charges against the Petitioner before the New Jersey Medical Board; the order of the New Jersey Board revoking Petitioner's license; and the report of the New Jersey hearing examiner which was adopted by the New Jersey Board and which specified the reasons for revocation. In the 100-page report of the New Jersey hearing examiner, the hearing examiner analyzed the evidence presented before him, made specific findings of fact and conclusions of law and discussed the reasons for each of his findings and conclusions.

At issue before the Board was: did the reasons for disciplinary sanction in New Jersey constitute reasons for limiting Dr. DeMarco's practice of medicine in Pennsylvania, and if so, to what extent. The Commonwealth, in its case in chief, presented no evidence pertaining to Petitioner's practice in Pennsylvania since Petitioner was not charged with any improper practice in the Commonwealth of Pennsylvania. However, Petitioner was not deprived of his right to present evidence of his practice in Pennsylvania, or even of his practice in New Jersey, if he wanted to introduce such evidence for its mitigating value. Recognizing the Board's discretion in taking action upon his license, Petitioner introduced Pennsylvania Department of Health investigation reports reflecting his compliance with that Department's directives and sixty (60) letters from his patients which attested to his good reputation. The record reveals that he made no specific offer of evidence which was rejected.

In considering arguments similar to those which Petitioner has set forth in his brief before this Court, the Commonwealth Court of Pennsylvania did not conclude that the Pennsylvania Board's action amounted to a delegation of its authority to the New Jersey Board nor did it conclude that Petitioner was precluded from presenting any relevant evidence. The Commonwealth Court interpreted the subject provision of the Medical Practice Act as an authorization to the Board to impose a disciplinary sanction, not a command. It concluded that a reading of the decision of the Pennsylvania Board confirms that the Board so viewed its powers and duties and had exercised its discretion accordingly. It also concluded that the New Jersey revocation had taken place for reasons which were set forth in the record before the Board and which could be

summarized as unprofessional conduct under Pennsylvania law as well as under New Jersey law (A. 16-17).

Looking beyond the mere fact that Petitioner had his license to practice medicine revoked in New Jersey, the Board concluded:

> "The records support the conclusions by the overwhelming weight of evidence that the Respondent, while licensed in both New Jersey and Pennsylvania, though practicing only in New Jersey, was guilty of a conscious and reckless indifference to the health and safety of his patients, deviated from standard practices of medical care in their treatment, recklessly and wilfully endangered his patients' lives, and inexcusably departed from minimal standards of care and treatment required of a practicing physician in any state." (A. 7)

In *Barsky v. Board of Regents of New York,* 347 U.S. 442 (1954), a physician who had disciplinary action against his license in New York complained that the New York Act, which made conviction of *any crime* a matter for which a license could be suspended or revoked, was overbroad and so far transcended the State's concern for professional standards as to violate the 14th Amendment. Barsky had been convicted of a crime outside the State of New York and the crime did not directly relate to the practice of medicine. This Court rejected Barsky's arguments, stating:

> "This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder. Realizing the importance of high standards of character and law observance on the

> part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically. It accordingly has sought to attain this justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner." (Id. at 452.)

Having a license to practice medicine and surgery revoked, suspended or otherwise limited by the proper licensing authority of any other state is an offense that has a far more rational relationship to the practice of medicine than does the conviction of any crime. As in *Barsky,* supra, the offense is established by statute and then the task remains to the qualified board to determine the measure of discipline to be applied to the offending practitioner. In the present case, the Pennsylvania Board not only had the opportunity to review the grounds for which Petitioner's license was revoked in New Jersey, it had an opportunity to review the New Jersey hearing examiner's analysis of the evidence presented before him in formulating his and the New Jersey Board's ultimate conclusions of fact and law. Petitioner's contention that the Board accepted the revocation of his license in another state as an irrebuttable presumption that he was unfit to practice medicine in Pennsylvania is without merit.

CONCLUSION

Recognizing that the hearing procedure before the Board did not deny Petitioner due process of law and that the decision of the Pennsylvania Commonwealth Court was consistent with both Pennsylvania law and decisions of this Court, the Supreme Court of Pennsylvania denied petitions for allowance of appeal and applications for reconsideration. Respondent respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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